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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals rendered an unnecessary judgment on the constitutionality of Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2), by failing to remand to the Immigration and Naturalization Service to determine the availability of alternative relief following the alien respondent's marriage to a United States citizen and the passage of the Refugee Act of 1980.

2. Whether Section 244(c)(2) is severable from the remainder of Section 244.

3. Whether the provision of Section 244 which cancels deportation and grants permanent residence to deportable aliens only after legislative review is a necessary and proper means of implementing the power of Congress over the admission of aliens.

The Senate also incorporates the following questions presented by the House of Representatives in its petition for certiorari:

4. Whether, in a proceeding under Section 106(a) of the Immigration and Nationality Act to review a final order of deportation, a court of appeals has jurisdiction to resolve the constitutionality of Section 244(c)(2) of the Act, which establishes congressional procedures for determining whether a particular deportation proceeding should be cancelled and the alien given permanent residence status.

5. Whether a concededly deportable alien has standing, in a Section 106(a) review proceeding, to challenge the constitutionality of Section 244(c)(2), pursuant to which the House of Representatives disapproved granting the alien permanent residence status.

6. Whether such a review proceeding constitutes a constitutional case or controversy, where both the deportable alien and the Immigration and Naturalization Service, the only two parties to the proceeding, are in total agreement that Section 244(c)(2) is unconstitutional and that the deportation order should be cancelled.

7. Whether the propriety of the Section 244(c)(2) procedures for congressional adjustment of the status of deportable aliens is a "political question."

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v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner United States Senate respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 22, 1980.

OPINIONS BELOW

The opinion of the court of appeals (App. A, No. 80–1832, 1a–63a) is reported at 634 F.2d 408. The decisions of the immigration judge (App. B, No. 80–1832, 64a–66a; App. D, No. 80–1832, 70a–71a) and the opinion of the Board of Immigration Appeals (App. E, No. 80–1832, 72a–73a) are not reported. The judgment of the court of appeals is App. K, *infra,* 84a, to this petition.

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[1] Jagdish Rai Chadha is also a respondent. The United States House of Representatives is filing a separate petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1980. On March 25, 1981, the court of appeals denied the petition for rehearing filed by the United States Senate and the Speaker of the United States House of Representatives (App. H, No. 80–1832, 76a).[2] This petition was filed within ninety days of the denial of rehearing, pursuant to Supreme Court Rule 20.4. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of Article I and II of the Constitution are set forth in App. J, No. 80–1832, 79a–81a. Sections 101(a)(42), 208 (a) and (b), 209(b), 243 (h)(1), 244 (a), (c) and (d), 245(a), and 246(a) of the Immigration and Nationality Act (INA) are set forth in App. L, *infra*, 85a–91a.

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[2] On March 24, 1977, Chadha petitioned to review the deportation order of the Immigration and Naturalization Service, invoking the jurisdiction of the court of appeals under Section 106(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1105a(a), to review "all final orders of deportation." On October 27, 1977, the INS informed the court of appeals that it agreed with Chadha that Section 244(c)(2) of the INA, 8 U.S.C. 1254(c)(2), is unconstitutional, and suggested that the court invite the Senate and House to file briefs *amicus curiae*, which was done. Following its decision on December 22, 1980, the court of appeals extended to February 4, 1981, the time to petition for rehearing and to file other motions. The Senate and House authorized intervention, S. Res. 40 and H.R. Res. 49, 97th Cong., 1st Sess., and, on February 3, 1981, filed motion to intervene and petitioned for rehearing. On March 10, 1981, the court granted the motions to intervene (App. G, No. 80–1832, 75a).

STATEMENT

Respondent Chadha is a British national. He resided in Kenya, where he was born, until entering the United States on a student visa in 1966. Chadha completed his studies in 1972. Because he overstayed his visa, the respondent Immigration and Naturalization Service (INS) issued an order to show cause why he should not be deported pursuant to Section 241(a)(2) of the INA, 8 U.S.C. 1251(a)(2), as a person who "is in the United States in violation of this Act." At an administrative hearing on January 11, 1974, Chadha admitted deportability (R. 20),[3] but stated that he could not return to Kenya without a work permit, and that the British Government had established a quota for East African Asians (R. 23). His counsel asserted that there was racial persecution by the government of Great Britain against Asians from East Africa (R. 25), and even greater discrimination in Kenya (R. 26).

Chadha's allegations of racial persecution prompted the immigration judge to inquire whether Chadha wished to apply for withholding of deportation under Section 243(h) of the INA, 8 U.S.C. 1253(h)(1976), which then provided: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for

[3] References to "R. ——" are to the Certified Administrative Record reproduced in the Appendix in the court of appeals.

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such reason." The immigration judge informed respondent that "under outstanding instructions when a person applies for withholding of his deportation, the matter must be referred to the Department of State and you must justify it. . . ." (R. 27).

Respondent's counsel applied instead for suspension of deportation under Section 244 of the INA, 8 U.S.C. 1254: "The reason I propose to apply for suspension is that . . . [Chadha] has to have permanent residence . . . in order to get gainful employment" (R. 26). Under Section 244(c)(1), the Attorney General may suspend the deportation of a qualified alien and transmit to the Congress a detailed statement of facts with the reasons for the suspension. For aliens such as Chadha, who have not committed crimes or other acts which place them under Sections 244(a)(2) and (c)(3), Section 244(c)(2) provides that the Attorney General shall cancel the deportation proceedings if neither House passes a resolution which states in substance that it disfavors suspension. Section 244(d) provides that "Upon the cancellation of deportation . . . the Attorney General shall record the alien's lawful admission for permanent residence. . . ."

Chadha's application asserted that he was "unable to return to either country of birth or nationality because of immigration laws and ethnic background" (R. 46). At a hearing on February 7, 1974, the immigration judge concluded "your case is not a particularly good one for suspension of deportation. . . . I'm unable to find on the basis of the evidence submitted that Mr. Chadha would suffer the extreme hardship

required by the statute" (R. 37–38). He adjourned the proceeding so that the respondent could apply for asylum but resumed it to announce that "on further thought I think I might be inclined to grant this application for suspension of deportation" (R. 39). The immigration judge asked Chadha to withdraw the request for asylum and, in a written decision, stated: "The respondent has established that it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation. . . . Because of his race and the difficulties he would face by reason thereof, I am satisfied that his deportation would result in an extreme hardship to him" (App. B, No. 80–1832, 66a).

On December 16, 1975, the House of Representatives agreed to House Resolution 926, "That the House of Representatives does not approve the granting of permanent residence in the United States to the [six] aliens hereinafter named . . . ," including respondent Chadha (App. C, No. 80–1832, 69a). Representative Eilberg stated: "It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet the statutory requirements, particularly as it relates to hardship. . . ." (App. C, No. 80–1832, 68a).

The deportation hearing was resumed on August 4, 1976. Chadha declined to designate a country of deportation, and the immigration judge informed counsel: "I propose to order that he be deported to the United Kingdom of which he is a citizen. If you think that he will be persecuted in that country you can

either apply for asylum to the District Director or you can apply for the withholding of deportation under Section 243(h)" (R. 11). Respondent again refused to apply for asylum or the withholding of deportation and a final order of deportation was entered on November 8, 1976 (App. D, N. 80–1832, 71a).

On November 26, 1980, while the petition for review was pending in the court of appeals, Chadha's counsel notified the court that respondent had married a United States citizen on August 10, 1980. As the spouse of a citizen Chadha may now be granted permanent residence under Section 245 of the INA, 8 U.S.C. 1255. Nonetheless, Chadha's counsel stated that he had no intention of applying for adjustment of status on the basis of his marriage and that he wished to pursue the constitutional issue in this case.

On December 22, 1980, the court of appeals held that the provision for legislative review in Section 244(c)(2) is severable from the remainder of Section 244 and is unconstitutional. The court "concluded that the essence of the violation here was the violation of the separation of powers rule. . . ." (App. A, No. 80–1832, 55a). On the question of severability, the court of appeals treated Section 244(c)(2) as a nonessential condition superimposed on the authority of the Attorney General to grant permanent residence to deportable aliens. In light of the importance of the intent of Congress, we set forth here the origin of Section 244 and its subsequent amendment.

Section 244 derives from the Act of June 28, 1940, Pub. L. No. 670, § 20, 54 Stat. 670, amending Section

19 of the Immigration Act of 1917. "Until 1940 deportation of aliens illegally within the United States was mandatory. The strict rule produced harsh results in many cases. . . . The suffering caused by these laws led to urgent requests for reform. Congress responded to these requests by passing the Alien Registration Act of 1940. . . ." (App. A, No. 80–1832, 38a).

Upon taking office, Secretary of Labor Frances Perkins temporarily suspended numbers of deportation proceedings on grounds of hardship, 78 Cong. Rec. 11783 (1934), and sent legislation to the 73d Congress to authorize the Secretary of Labor to allow deportable aliens meeting certain requirements to remain in the United States. H.R. 9725, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 11781–82. The Department's bill was opposed because it "grants too much discretionary authority," *id.*, 11790 (remarks of Rep. Dirksen), and it failed decisively. *Id.*, 11791.

Proposed legislation to give the executive branch discretion to grant permanent residence to deportable aliens also failed in the 74th and 75th Congresses. It was not until a mechanism for legislative review was agreed to in the 76th Congress that the stalemate was broken.

In 1939, Representative Smith offered an amendment to H.R. 5138 to grant discretionary authority to a board in the Department of Labor to suspend deportations which would cause serious economic detriment to a dependent citizen or legally resident wife, parent, or child of a deportable alien. If the order of suspension was for longer than six months the facts should

be reported to Congress, and "upon the failure of Congress to act or resolve in respect of the case before the next adjournment or regular session . . . the order suspending deportation shall be vacated and deportation of the alien shall be immediately effected." The House agreed to the amendment, and passed the bill. 84 Cong. Rec. 10454–55 (1939).

Secretary Perkins questioned the usefulness of Representative Smith's amendment. In a letter to Senator Danaher she wrote: "[I]t does not appear that the proviso in question will accomplish anything tangible. It really adds nothing to powers not already possessed by the Department or by the Congress."[4]

The Senate Committee on the Judiciary reported a substantially revised bill which authorized the Secretary of Labor to suspend deportations and to report to Congress: "If . . . the Congress shall by Act or resolution reject the recommendation of the Secretary of Labor that official shall effect the deportation of the alien. . . . Upon the failure of Congress to act or resolve . . . the suspended order of deportation shall be vacated and deportation proceedings canceled. . . ." Section 10 of H.R. 5138, as reported with amendments on May 29, 1940.

On June 10, 1940, the Committee on the Judiciary reported a substitute bill, Senator Connally informed the Senate: "We called on the Department of Justice,

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[4] *Crime to Promote Overthrow of Government: Hearings on H.R. 5138 Before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 3d Sess. 29 (1940).

and had the Solicitor General with us. We called in the Commissioner of Immigration and Naturalization, and together we went over all the existing laws, and worked the new provisions into the existing laws, so as to make a harmonious whole." 86 Cong. Rec. 8345 (1940).

The Committee substitute provided that the Attorney General [5] may suspend deportations of qualified individuals and report to Congress. "If during that session the two Houses pass a concurrent resolution stating in substance that the Congress does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien. . . . If during that session the two Houses do not pass such a resolution, the Attorney General shall cancel deportation proceedings . . . [and] the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States. . . ." S. Rep. No. 1796, 76th Cong., 3d Sess. 5–6 (1940). The conference agreed to the Senate bill,

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[5] On May 22, 1940, President Roosevelt proposed the transfer of the Immigration and Naturalization Service to the Department of Justice pursuant to Reorganization Plan No. 5, 86 Cong. Rec. 6590 (1940). Under Section 5 of the Reorganization Act of 1939, Pub. L. No. 19, 53 Stat. 561, the plan was subject to disapproval by a concurrent resolution of the Senate and House.

The Department of Justice supports the constitutionality of congressional review of reorganization proposals and has cited congressional review of the grant of permanent residence to deportable aliens as precedent for its conclusion. S. Rep. No. 232, 81st Cong., 1st Sess. 20–21 (1949) (text of memorandum from the Department of Justice).

and Representative Celler championed the conference report on the House floor:

> In the original act provision was made for the suspension of deportation in hardship cases. But that suspension could be effected only by a specific act of Congress in each specific case. It would have been impossible to get both Houses to act in that fashion. . . . But the conferees have now seen the light and have provided that the Attorney General shall have the discretionary power to suspend deportation in these hardship cases. His action shall not be vetoed or gainsaid unless Congress specifically vetoes or cancels his waiver of deportation or suspension of deportation in each case. This is a great difference. It makes the act humane and reasonable. It was inhumane and unreasonable before.

86 Cong. Rec. 9035 (1940). President Roosevelt approved the bill on June 28, 1940.

In 1948, the Congress provided that deportation proceedings may be canceled only if "the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation. . . . Pub. L. No. 863, 62 Stat. 1206 (1948). President Truman approved the bill on July 1, 1948.

In 1952, the Senate and House Committees on the Judiciary reported bills with identical provisions for congressional review. For certain classes of aliens, "the Attorney General is required to report each case in which he suspends deportation . . . to the Congress and the adjustment of status will become final

in absence of adverse action by either the Senate or House of Representatives." S. Rep. No. 1137, 82d Cong., 2d Sess. 24 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 62 (1952). For "a deportable alien of a criminal, subversive, immoral, or narcotic class or who overstays his period of admission . . . the adjustment does not become effective unless Congress affirmatively approves the adjustment by a concurrent resolution. . . ." S. Rep. No. 1137 at 25; H.R. Rep. No. 1365 at 62.[6] Both Houses agreed to these provisions. President Truman's unsuccessful veto message stated objections to other portions of the bill, which became the Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163. He stated no objection to the provisions for legislative review. H.R. Doc. No. 520, 82d Cong., 2d Sess. (1952).

The current form of Section 244 was enacted in 1962. The managers for the House stated: "[U]nder the language agreed to by the committee of conference, the granting of relief will be subject to congressional review. . . ." H.R. Rep. No. 2552, 87th Cong., 2d Sess. 4 (1962).[7] Senator Keating, a conferee, explained:

[6] The Deputy Attorney General and the Acting Commissioner of the Immigration and Naturalization Service submitted their views on the legislation: neither objected to the form or principle of congressional review, *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcommittees of the Committee on the Judiciary on S. 716, H.R. 2379, and H.R. 2816*, 82d Cong., 1st Sess. 280-88, 711-22 (1951).

[7] The conference agreement substantially liberalized the availability of relief to aliens, such as Chadha, who overstay nonimmigrant visas. Under the Immigration and Nationality Act of 1952, a concurrent resolution of approval was necessary

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"Should the Attorney General believe the application meritorious, he would recommend suspension of deportation to the Congress as under present law, and the Congress by resolution could approve the recommendation, suspend the alien's deportation, and adjust his status to that of permanent residence." 108 Cong. Rec. 23448–49 (1962). President Kennedy approved the bill on October 24, 1962. Pub. L. No. 87–885, 76 Stat. 1247 (1962).

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS RENDERED AN UNNECESSARY JUDGMENT ON THE CONSTITUTIONALITY OF AN ACT OF CONGRESS

The court of appeals unnecessarily decided the constitutionality of Section 244 when two nonconstitutional avenues of relief for Chadha necessitated a remand to the Immigration and Naturalization Service for reconsideration. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *New York City Transit*

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to grant permanent residence to an alien who was deportable "as a person who has remained longer in the United States than the period for which he was admitted." Sections 244(a)(5)and (c); 66 Stat. 215–16 (1952). The conference agreement in 1962 brought aliens who overstay their visas within the provisions of a new Section 244(a)(1); they are granted permanent residence if neither House objects to the recommendation of the Attorney General.

Authority v. *Beazer*, 440 U.S. 568, 582 (1979), *quoting Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

First, Chadha married a United States citizen on August 10, 1980. Section 245 of the INA authorizes the Attorney General to grant permanent residence to Chadha as the spouse of a citizen. The immigration judge in Chadha's case had told him that "if you married you would have no difficulty in having your status adjusted" (R. 38). Upon learning of Chadha's marriage, the court of appeals should have remanded the case to INS to reconsider the need for suspension of deportation.

Second, Chadha's allegation of a threat of persecution in the United Kingdom or Kenya provides him with another nonconstitutional avenue of relief. With the passage of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102, it can no longer be said that "the Attorney General will deport [Chadha] should his challenge fail" (App. A, No. 80–1832, 17a).

Prior to the 1980 Act, the Attorney General was "authorized to withhold deportation" under Section 243(h) of the INA. Now the Attorney General "shall not deport" when he determines that a claim of racial persecution is well-founded. Section 203(e) of the Refugee Act, amending Section 243(h) of the INA; H.R. Rep. No. 96–608, 96th Cong., 1st Sess. 18 (1979).[8] If the Attorney General believes that

[8] Under INS precedent the correct remedy for Chadha has always been the withholding of deportation under Section 243(h). See *Matter of Kojoory*, 12 I. & N. Dec. 215, 19–20 (1967)

Chadha's fear of racial persecution is well-founded, he must withhold the deportation order on which the jurisdiction of the court of appeals rested.[9] After the passage of the Refugee Act Chadha's case "assume[s] a posture quite different from the one now presented," *Thorpe* v. *Housing Authority,* 386 U.S. 670, 673 (1967), and a remand is required. *See INS* v. *Stanisic,* 395 U.S. 62, 79 (1969).

The court of appeals brushed aside the availability of alternative relief by making Chadha a permanent resident of the United States retroactive to 1974 when his deportation was suspended (App. A, No. 80–1832, 18a (fn. 6)). This fiat violates the plain language of Section 244(d) that the Attorney General shall record an alien's admission for permanent residence "[u]pon the cancellation of deportation," which may not occur until there has been favorable congressional

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("Where a respondent cannot establish the necessary hardship for suspension, we do not believe that a claim of persecution should be used to make up the deficit. The remedy available where the likelihood of persecution can be satisfactorily established is a stay of deportation under section 243(h)").

[9] The 1980 Act also authorizes the Attorney General to grant asylum to aliens who fear persecution in the country of their nationality or residence until he "determines that the alien is no longer a refugee . . . owing to a change in circumstances in the alien's country of nationality. . . ." Section 201(b) of the Refugee Act, adding Section 208 of the INA. It additionally gives discretion to the Attorney General to grant permanent residence to 5,000 refugees annually one year afer the grant of asylum. Section 201(b) of the Refugee Act, adding Section 209(b) of the INA. The authority to withhold deportation, grant asylum, and adjust the status of refugees is not subject to legislative review.

review pursuant to Section 244(c).[10] There is no statutory basis for the relief granted by the court and its decision to rewrite the statute in order to reach the constitutional question was unwarranted.

II

THE DECISION OF THE COURT OF APPEALS ON SEVERABILITY PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

The role of the Congress in determining whether permanent residence should be granted to deportable aliens is an inseverable part of Section 244. The court of appeals believed that Subsection 244(a) is an independent source of final executive authority "to suspend deportation and adjust the status" of deportable aliens (App. A, No. 80–1832, 15a–16a). But Subsection 244(a) merely introduces the full section, states the categories of aliens who are eligible

[10] The Congress has given explicit consideration to the date on which an alien shall become a permanent resident if his deportation is cancelled. The first statutory authority for the cancellation of deportation provided that "Upon the cancelation of such proceedings . . . the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States. . . ." Act of June 28, 1940, Pub L. No. 670, § 20, 54 Stat. 670, 672. The provision for the retroactive grant of permanent residence was retained in the Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206. The dating of permanent residence was changed in the Immigration and Nationality Act of 1952, and Section 244(d) provides that "the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made. . . ." The relief decreed by the court of appeals—the dating of permanent residence back to the suspension of deportation—is a judicial invention.

for relief, and provides threshold eligibility criteria. The grant of limited power to the Attorney General is "[a]s hereinafter prescribed in this section. . . ." The authority to suspend deportation is provided in Subsection 244(c)(1), rather 244(a), and is properly characterized as a "deferment of deportation." *McGrath* v. *Kristensen*, 340 U.S. 162, 168 (1950). The only authority to "cancel deportation proceedings" is in Subsection 244(c)(2), the very provision which the court of appeals invalidated. The recording of the alien's lawful admission for permanent residence, Subsection 244(d), occurs "[u]pon the cancellation of deportation" under Subsection 244(c)(2). Speaking of the antecedent of Subsection 244(c)(3), this Court recognized that "deportation finally cancels only if Congress affirmatively approves the suspension by a favorable concurrent resolution. . . ." *Jay* v. *Boyd*, 351 U.S. 345, 351 (1956).

The history of Section 244 confirms that Congress always intended legislative review to be indispensable to the grant of permanent residence on the ground of hardship. In three successive Congresses, the 73d, the 74th, and the 75th, proposals to grant discretion to the executive branch were defeated. The breakthrough was achieved in 1940 by the adoption of a requirement for congressional review. The 1940 Act added a single section containing both the delegation of limited authority to the Attorney General and the procedure for congressional review. *Cf. United States* v. *Jackson*, 390 U.S. 570, 586–89 (1968) (provision severable when adopted as subsequent amendment to the underlying provision).

All events after 1940 underscore the intention of Congress that legislative review is inseparable from the authority delegated to the Attorney General. The Congress has amended the provision for suspension and cancellation three times since 1940; each amendment has provided for a form of congressional review. The severability decision of the court of appeals depends on the choice of the drafters of the Immigration and Nationality Act of 1952 to organize Section 244 into subsections, but the wording and legislative history of Section 244 preserves the integral role of legislative review.[11]

The intent of Congress is also expressed in the 1962 amendment to Section 244 which establishes its current text: "Under the language agreed to by the committee of conference, the granting of relief will be subject to congressional review. . . ." H.R. Rep. No. 2552, 87th Cong., 2d Sess. 4 (1962).[12]

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[11] The one reference which the court of appeals makes to the long legislative history of Section 244 is to remarks of Representative Dies in 1937, three years before the passage of the 1940 Act (App. A, No. 80–1832, 15a). Representative Dies was speaking in favor of a bill which would have given final authority to the Attorney General, not subject to legislative review, to grant permanent residence to a limited number of deportable aliens, 8,000 in all, over a four-year period. 81 Cong. Rec. 5542 (1937). The bill passed the House but was not voted on in the Senate.

[12] The intention of the Congress in Section 244 is emphasized by Section 246 of the INA, 8 U.S.C. 1256, which was also enacted as part of the Immigration and Nationality Act of 1952. Section 246 provides for the rescission of permanent residence when the Attorney General subsequently determines that individuals who were granted adjustment had not been eligible for it. Section 246 provides that if adjustment occurred under Section 244, rescission requires congressional approval. If adjust-

No opinion of this Court on severability is precedent for the dissection performed by the court of appeals. In none of the leading cases—*Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234-35 (1932), *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 433-39 (1938), and *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976)—was the challenged authority enacted as a limitation on authority delegated under the statute.[13] The decision of the court of appeals is inconsistent with the principle voiced by the Fourth Circuit:

> When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent.

McCorkle v. *United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). The procedures of Section 244 are an inseverable whole and the effort of the court of appeals to take them apart should be reviewed on certiorari.

ment occurred under Section 245 and 249, rescission does not require congressional approval. The reason for the contrast is clear. The Attorney General lacks authority to rescind permanent residence granted under Section 244 because the grant did not occur by his authority, but by favorable congressional review; he has authority to rescind adjustments under Sections 245 and 249 because he had final authority to grant those adjustments originally.

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[13] "Where the focus of legislation was on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart apart from the procedure for its enforcement." *Arnett* v. *Kennedy*, 416 U.S. 134, 152 (1974).

III

CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE COURT OF APPEALS THAT SECTION 244 IS UNCONSTITUTIONAL

We agree with appellant Immigration and Naturalization Service in No. 80–1832 that this case presents fundamental constitutional issues. The reasons why the question on appeal in No. 80–1832 is substantial are also reasons why certiorari should be granted.

The court of appeals "concluded that the essence of the violation here was the violation of the separation of powers rule. . . ." (App. A, No. 80–1832, 55a). The court acknowledged that:

> no circuit or Supreme Court authority we have found holds the Legislature has impermissibly invaded the prerogative of the Executive or the Judiciary absent a clause in the Constitution which confers the powers upon another branch with great specificity.

Id., 25a (citations omitted). The court could find no clause, such as the Appointments Clause, see *Buckley* v. *Valeo*, 424 U.S. 1, 118 (1976), and so it reasoned generally about the nature of executive and judicial functions. It concluded that Section 244 interferes with executive and judicial functions, but there is no citation to any actual interference with the consistent administration of the statute by the executive branch or the limited functions of the judicial branch under the INA during the forty-year history of Section 244 and its predecessor.

If the merits are reached, the proper starting point is the power which the Congress is implementing in Section 244 and its authority to implement that power under the Necessary and Proper Clause. "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972), *quoting Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909). The objective of Congress—the amelioration of the hardship of the deportation laws—is certainly within the constitutional power of the Congress.

The respondents assert that the means chosen to achieve this legitimate and humane objective are prohibited, namely by the principle of bicameralism and the requirement in the Presentation Clause, Art. I, Sec. 7, cl. 3, that "Every . . . Resolution . . . to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States. . . ."

Section 244 of the Immigration and Nationality Act of 1952, prior to the 1962 amendment to the Act, required that permanent residence for aliens who overstay nonimmigrant visas, as Chadha did, be approved by concurrent resolution of both Houses. The 1962 amendment facilitates the grant of permanent residence to such aliens by providing for permanent residence if neither House objects. The respondents do not say that the requirement for affirmative bicameral approval in the 1952 Act is constitutionally preferable to the 1962 amendment, for a requirement of affirmative bi-

cameral approval gives to either House the power to reject the Attorney General's recommendation.[14] Rather, the heart of respondent's case is that the Presentation Clause limits the Congress to two choices: the delegation of complete discretion to the Attorney General, or the denial of any discretion to him and the presentation to the President of a bill for each alien who should be granted relief from deportation.

The requirements of the Presentation Clause have been met by Section 244. Four presidents—President Roosevelt in 1940, President Truman in 1948, President Eisenhower in 1957,[15] and President Kennedy in 1962—have approved bills which provide for submission to the Congress of the question whether deportable aliens should be granted permanent residence. Each had available to him the power under the Presentation Clause to object to legislation which would circumvent the clause, and each approved of procedures which leave to the Congress the decision whether to grant permanent residence to deportable aliens.

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[14] Section 244(c)(3) of the INA provides that the deportation of an alien who is deportable because of criminal activity, and other specified grounds, may be cancelled only upon a favorable concurrent resolution of the Congress. The validity of Section 244(c)(3) is thrown into doubt by the sweeping decision of the court of appeals, even though it fully complies with the principle of bicameralism and expresses the special concern of the Congress over the grant of permanent residence to persons with criminal records.

[15] President Eisenhower approved the Act of September 11, 1957, Pub. L. No. 85-316, § 13, 71 Stat. 642, U.S.C. 1255b.

Section 244 is an accommodation between the political branches to bring humanity into an otherwise inflexible deportation law. The court of appeals relied on an abstract theory of separation of powers to set aside this accommodation in disregard of this Court's admonition that "[t]he reasons which preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." *Mathews* v. *Diaz,* 426, U.S. 67, 81–82 (1976) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 1981.

APPENDIX K*

United States Court of Appeals for the Ninth Circuit

No. 77-1702

JAGDISH RAI CHADHA, PETITIONER

v.

IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT

JUDGMENT—I&NS No. A17-385-958

[SAN FRANCISCO]

Upon Petition to Review an order of the Immigration and Naturalization Service

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the deportation proceedings of the I&NS in this Cause be, and hereby is cancelled.

Filed and entered: December 22, 1980.

*The appendices to the petition are lettered and paginated consecutively to the appendices to the jurisdictional statement in No. 80-1832.

APPENDIX L

Statutory Provisions Involved

1. Section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42), provides:

As used in this Act—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social

group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Section 208 (a) and (b) of the INA, 8 U.S.C. 1158 (a) and (b), provides:

(a) The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

(b) Asylum granted under subsection (a) may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 101(a)(42)(A) owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided.

3. Section 209(b) of the INA, 8 U.S.C. 1159(b), provides:

(b) Not more than five thousand of the refugee admissions authorized under section 207(a) in any fiscal year may be made available by the Attorney General, in the Attorney General's discretion and

under such regulations as the Attorney General may prescribe, to adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—

(1) applies for such adjustment,

(2) has been physically present in the United States for at least one year after being granted asylum,

(3) continues to be a refugee within the meaning of section 101(a)(42)(A) or a spouse or child of such a refugee,

(4) is not firmly resettled in any foreign country, and

(5) is admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of examination for adjustment of such alien.

Upon approval of an application under this subsection, the Attorney General shall establish a record of the alien's admission for lawful permanent residence as of the date one year before the date of the approval of the application.

4. Section 243(h)(1) of the INA, 8 U.S.C. 1253 (h)(1), provides:

(h)(1) The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(19) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

5. Section 244 (a), (c) and (d) of the INA, 8 U.S.C. 1254 (a), (c) and (d), provides:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a); has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * * * *

(c)(1) Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

(3) In the case of an alien specified in paragraph (2) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel

deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

(d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made, and unless the alien is an immediate relative within the meaning of section 201(b) the Secretary of State shall reduce by one the number of nonpreference immigrant visas authorized to be issued under section 203(a)(7) for the fiscal year then current.

6. Section 245(a) of the INA, 8 U.S.C. 1255(a), provides:

(a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

7. Section 246(a) of the INA, 8 U.S.C. 1256(a), provides:

(a) If, at any time within five years after the status of a person has been adjusted under the provisions of section 244 of this Act or under section 19(c) of the Immigration Act of February 5, 1917, to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall submit to the Congress a complete and detailed statement of the facts and pertinent provisions of law in the case. Such reports shall be submitted on the first and fifteenth day of each calender month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution withdrawing supsension of deportation, the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made.

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